

No. 18-16896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.,
Plaintiffs-Appellees,

v.

THE STATE OF ARIZONA and MARK BRNOVIC, ARIZONA
ATTORNEY GENERAL,
Defendants-Appellants,

and JIM DRISCOLL, COCONINO COUNTY SHERIFF, *et al.,*
Defendants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 3:17-cv-08263

BRIEF OF *AMICI CURIAE*, AMERICAN FRIENDS SERVICE
COMMITTEE, ISRAEL PALESTINE MISSION NETWORK OF THE
PRESBYTERIAN CHURCH (USA), A JEWISH VOICE FOR PEACE,
INC., US CAMPAIGN FOR PALESTINIAN RIGHTS, US PALESTINIAN
COMMUNITY NETWORK, US CAMPAIGN FOR THE ACADEMIC
AND CULTURAL BOYCOTT OF ISRAEL AND FRIENDS OF SABEEL
NORTH AMERICA, IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

A Jewish Voice for Peace, Inc. has no parent corporations. It has no stock, so therefore no publicly held company owns 10% or more of its stock. The other *amici* joining in this brief are not corporations.

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INTEREST OF AMICI CURIAE¹

Amici are the American Friends Service Committee, the Israel Palestine Mission Network of the Presbyterian Church (USA), A Jewish Voice for Peace, Inc., the US Campaign for Palestinian Human Rights, the U.S. Palestinian Community Network, Friends of Sabeel, and the United States Campaign for the Academic and Cultural Boycott of Israel. Each of the *amici* is a U.S.-based peace, social justice, and/or religious non-governmental organizations. Each is committed to justice, equality and human rights of all people, including Palestinians and Israelis. The *Amici* support the boycott of Israel for the purpose of pressuring Israel to respect the human rights of the Palestinian people.

The *Amici* collectively have thousands of members and supporters, in Arizona and throughout the United States, who participate in the boycott of Israel and who are affiliated with companies that would be directly affected by the enforcement of A.R.S §§ 35-393 et seq., the statute at issue in this case. They have organized or supported scores of different boycott campaigns for Palestinian human rights. Each of the *Amici* came to support the boycott movement on the basis of its own political, religious and moral

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one, except counsel for Amici, has authored this brief in whole or in part or contributed money toward the preparation of this brief. All parties have consented to the filing of this brief.

principles, in order to challenge and express disapproval of the Israeli government's discriminatory policies. All of the *Amici* seek to communicate to the Court that support for the boycott movement is not discriminatory. Support for the boycott movement is a measure to combat the systematic discriminatory practices of the Israeli government that deny Palestinians justice and equality under the law. Accordingly, the proposed *Amici* have “. . . a unique perspective [and] specific information that can assist the Court beyond what the parties can provide.” Voices for Choices v. Ill. Bell Tel. Co., 339 F. 3d 542, 545 (7th Cir. 2003)(Posner, J., in chambers). The proposed *Amici* seek to appear in support of Plaintiffs-Appellees Mikkel Jordahl and Mikkel (Mik) Jordahl, P.C. and in support of affirmance of the order of the District Court made on September 27, 2018.

INTRODUCTION

By order dated September 27, 2018, the District Court enjoined enforcement of the Certification Requirement in A.R.S. § 35-393.01(A), which provides that every company contracting with public entities in the State of Arizona must certify that it is not engaged in, and for the duration of the contract promises that it will not engage in, a boycott of Israel. The District Court readily concluded that requiring Plaintiffs-Appellees to

promise not to engage in a boycott of Israel burdened expressive political activity protected under the First Amendment, and that the State had no legitimate countervailing interest in restricting the expressive conduct of Plaintiff-Appellees on a matter of public concern.

For centuries, boycotts have been effective mechanisms for political protest; the Boston Tea Party, the Montgomery Bus Boycott, and the global movement to divest from South African businesses, for example, all sought and contributed to desired social change. Boycott and divestment campaigns for Palestinian human rights are no different. In aiming to change the state practices of Israel, boycott campaigns engage in an activity that lies at the heart of the First Amendment in a democracy—people who share common views banding together in expressive activity to achieve a common end. The District Court fulfilled its time-honored role in protecting this expressive activity.

Appellants have sought to invoke US laws against discrimination in their effort to justify the Certification Requirement. To do this, they have created a false identity between Jews, on the one hand, and the State of Israel and its policies on the other. They suggest, in other words, that boycotting the State of Israel is the same as boycotting Jews. But the State of Israel is not within any class or category protected by US laws against

discrimination, and the boycott movement for Palestinian rights does not discriminate against Jews or any other group. Companies and institutions are boycotted for complicity in Israel's human rights abuses, not because of their religious affiliation or national origin. They are boycotted, in other words, because of what they do, and not because of who they are.

Boycotts to support Palestinian rights thus are not discriminatory. They are efforts to pressure the government of the state of Israel to end its discrimination against the Palestinian people, by exerting economic pressure on companies and institutions that facilitate and profit from the state's human rights abuses. The boycott movement seeks equal treatment for all people; no more but no less. As such, it is the antithesis of discrimination.

ARGUMENT

The Identity of the Proposed Amici

The breadth of support for the boycott movement can be seen from the identity of the *Amici*:

The American Friends Service Committee (AFSC) is a non-profit Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. Through offices in sixteen countries around the world and in 37 cities around the United States (including Tucson, AZ),

AFSC implements programs to realize peace with justice. Founded in 1917, AFSC has worked in Israel, the West Bank, and Gaza since 1949 and currently maintains offices in Jerusalem and Gaza.

Quakers and AFSC have a long history of engagement in economic activism including support for boycotts, divestment and sanctions. Quakers pioneered the use of boycotts when they helped lead the “Free Produce Movement”, which boycotted goods produced using slave labor during the 1800s. In more recent history, AFSC has supported and led a variety of boycott and divestment campaigns linked to civil rights, anti-apartheid, farm worker, immigration, and prison rights struggles.

AFSC sees these actions as appeals to conscience, actions that seek to raise awareness in those engaged or complicit in harmful practices of the impact of their actions. Economic activism keeps people accountable to their values and when rightly ordered serves to affirm our common humanity while effectively pushing change forward. AFSC’s work in Israel and the Occupied Palestinian Territory is also complemented by advocacy work conducted in the U.S., which aims to change U.S policy and impact U.S. public opinion as part of an effort to realize a just and lasting peace in Israel and Palestine. This advocacy work includes support for various boycott and divestment campaigns organized in response to the call made by Palestinian

civil society in 2005 for boycott, divestment, and sanctions (BDS) to pressure Israel to comply with international law and respect Palestinian rights. AFSC supports economic action to target companies or institutions that are complicit in human rights violations, violations of international law, or that otherwise support Israel's military occupation.

The Israel Palestine Mission Network of the Presbyterian Church (USA) (IPMN) is an ardent supporter of the BDS Movement (Boycott, Divestment, Sanctions) in order to end Israel's violations of Palestinian human rights. The Presbyterian Church has a history of economic actions as public witness, dating back to the 1960s with boycotts of corporations profiting from injustice, as well as economic actions aimed at dismantling the apartheid regime in South Africa. In the case of Palestine, IPMN has been called by churches in the cradle of our faith to stand in solidarity with the people of Palestine by supporting them through nonviolent economic actions. BDS is nonviolent action that moves the church toward not profiting from Israeli human rights violations and connects its theology with the stewardship of its assets.

Jewish Voice for Peace (JVP) is a national grassroots organization inspired by Jewish tradition to work for the equality and freedom of all people in Israel/Palestine. JVP currently has over 16,000 dues-paying

members, over 250,000 supporters, and over 70 chapters, in Arizona and around the country, making it one of the largest and fastest growing Jewish organizations in the country. Jewish Voice for Peace endorsed the call for Boycott, Divestment and Sanctions (BDS) in 2015. The BDS movement is the most promising non-violent tactic to express international solidarity with Palestinian people. As a Jewish organization, JVP is especially sensitive to concerns about anti-Semitism, but in years of working with the Boycott National Committee (BNC), which directs the BDS movement, JVP has seen a commitment to fighting bigotry in all its forms, including anti-Semitism.

The US Campaign for Palestinian Rights (USCPR) is a coalition of more than 300 organizations nationwide working together for freedom, justice, and equality for the Palestinian people. USCPR opposes all forms of racism and oppression, including anti-Semitism. USCPR began its first boycott for Palestinian rights in 2002 confronting Caterpillar Incorporated for selling the armored D9 bulldozers that the Israeli government has used in the illegal demolition of Palestinian families' homes.

Over the years, USCPR has helped lead boycotts against SodaStream, G4S, Veolia, Airbnb, and Ahava, all of which have ended or moved toward

ending their harmful practices against Palestinians. USCPR is inspired by the role of boycotts in the Civil Rights Movement and the anti-Apartheid movement in nonviolently achieving positive change.

USCPR engages in the boycott for Palestinian rights for ethical and strategic reasons. Ethically, it is the responsibility of all people of conscience not to actively participate in the oppression of another people, economically or otherwise. . Strategically, the boycott movement is the single most effective tactic to advocate for Palestinian rights in the United States. The boycott educates people on the connections between their actions and the lives of others, and empowers people to take nonviolent action in line with their values. The power of those collective actions is to take the profit out of Israel's discriminatory practices, incentivizing a different, more just way forward.

The United States Campaign for the Academic and Cultural Boycott of Israel (USACBI) was formed in 2009 in response to the call by Palestinian civil society for boycott, divestment and sanctions against Israel. USACBI is an independent, volunteer non-profit organization comprised primarily of academics but also cultural workers. USACBI supports the Palestinian BDS movement which seeks to uphold international human rights, and focuses its work primarily on academic boycott campaigns to end

cooperation with Israeli universities, which collaborate with the Israeli state in enacting policies that repress and subjugate Palestinians.. Israeli universities have been complicit in theft of Palestinian land; they generate research, especially military research, used against Palestinians living under occupation; and they engage in systemic discrimination by Israeli universities against Palestinians in Israel.

USACBI also supports the academic and cultural boycott of Israel because Palestinian faculty and students do not have academic or political freedom due to Israeli restrictions on their research, mobility, work and study, and because Israel uses cultural programming to whitewash its racist policies and violations of international law. To date, close to 2000 individuals and more than a dozen national academic organizations have endorsed USACBI's call for the academic and cultural boycott of Israel.

The U.S. Palestinian Community Network (USPCN) was founded in 2006 as a national, member-based institution with the mission to re-establish Palestinian and Arab community organizing in the U.S., to help win the Right of Return, an end to Israeli occupation and colonization, and equality for the Palestinian people. USPCN came to the decision to support BDS in conversations with partners and allies in the Palestinian and Palestine solidarity communities in the U.S.; and then brought the discussion

to its National Coordinating Committee, whose members came to consensus that BDS was a strong tactic to utilize in the United States.

USPCN supports BDS because boycott is a non-violent strategy that has traditionally been used in this country and throughout the world as an important organizing tool to win justice for oppressed communities like those in Palestine. and because BDS is a carefully developed mechanism that has the full support of all the most important non-governmental organizations, political parties and movements in Palestine itself.

Friends of Sabeel North America (FOSNA) fully supports the call for BDS as a Palestinian-initiated global, grassroots movement for Palestinian rights. As people of faith, members of FOSNA recognize that justice demands them to stand with the vulnerable, the silenced, and the oppressed. Sabeel's founder, Reverend Naim Ateek, was one of the signers of the 2009 Kairos Palestine document, a call from the churches of Palestine for divestment and boycott of Israel as "tools of nonviolence for justice, peace, and security for all." As an organization amplifying Sabeel's efforts, FOSNA, too, has adopted the call for BDS. Boycotts, divestment, and sanctions were effective methods used to target apartheid in South Africa, racial discrimination in the United States, and British colonial rule in India. Building on this history, the BDS movement leverages grassroots power

against Israeli settler-colonialism, apartheid, and military occupation. FOSNA is active in educating church communities on Palestine, mobilizing them to launch boycott campaigns, and organizing denominations to divest from companies complicit in Israel's occupation.

As described above, each of the Amici is an organization that has concluded, through its own process, that the boycott movement is the most effective non-violent means to pressure Israel to respect Palestinian human rights. The Amici, and others who endorse the boycott movement, have done so independently of each other and at different times. They have no ties to any government. All of the Amici share a commitment to nondiscrimination, equality, and to combatting all forms of racism including anti-Semitism. Amici hold a deep and abiding commitment to the integrity and moral force of international human rights law and have raised their voices to defend Palestinian human rights in the face of and despite strong opposition from Israeli and U.S. institutions. Like the anti-apartheid movement in South Africa and the Civil Rights movement in the United States, the boycott movement to support Palestinian rights is born of “. . . determination to remedy past injustices, and a host of voluntary decisions by free citizens . . .” N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 888 (1982).

The Purpose of the boycott movement

The purpose of the boycott movement is to pressure Israel to stop its oppression of Palestinians, which has been going on for more than seventy years. The Palestinian people, who are indigenous to what is today Israel and the Occupied Palestinian Territory, including East Jerusalem, were driven by Israeli forces from their land and homes and were not allowed to return. In the West Bank, they have been disenfranchised, subjected to Israeli military occupation and Israeli military rule with no voice in the government that restricts their daily movement. Israel continues to dispossess them of their land in order to build Jewish-only settlements that are illegal under international law. In Gaza, they are trapped by a blockade from land, sea and air, deliberately kept with inadequate food, fuel or materials to repair the destruction caused by repeated Israeli bombardments that have destroyed the infrastructure, killed thousands, and are rendering the besieged and densely populated area unlivable. The World Bank has reported a rapid collapse in humanitarian conditions in Gaza, including access to medical treatment, electricity, and clean water. 54 percent of the

labor force is unemployed, including 70 percent unemployment among youth.²

Israel has explicitly denominated its Palestinian citizens as second-class citizens, subject to persistent *de facto* and *de jure* discrimination manifested in over fifty Israeli laws codifying discrimination in all areas of life including political participation, access to land, education, infrastructure and criminal procedures.

The international community has failed to protect Palestinians from these Israeli violations of international law, and the United States has provided unconditional aid and support to Israel despite these violations.

In 2005, Palestinian civil society appealed to the international community for help in securing the right to freedom, justice and equality for Palestinians, based on international law. The more than 170 organizations joining in this appeal included labor unions, charitable organizations, political organizations and human rights organizations. They do not take direction from any government.

Inspired by the South African anti-apartheid movement and the Civil Rights movement in the United States, which employed boycotts as a tactic to exert pressure for justice, the Palestinian appeal called for boycott,

² <http://www.worldbank.org/en/country/westbankandgaza/overview>.

divestment and sanctions (“BDS”) to exert nonviolent pressure on Israel until it complies with international law by meeting three demands:

- Ending its occupation and colonization of all Arab lands and dismantling the Separation Wall.
- Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality.
- Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.

Boycotts for Palestinian rights uphold the simple principle that Palestinians are entitled to the same rights as the rest of humanity. Boycotts for Palestinian rights are used to pressure Israel to comply with international law and universal principles of human rights. As a matter of principle, the BDS movement categorically opposes all forms of racism, including Islamophobia and anti-Semitism. The BDS movement stands for freedom, justice and equality.

The Genesis of the Certification Requirement

The government of Israel has spent millions of dollars through its front groups and partner organizations on lobbying efforts, to encourage state and municipal governments in the United States to enact provisions like the Arizona Certification Requirement, requiring persons who seek to contract with state entities to promise they will not engage in activity that is constitutionally protected.³ These certifications of non-participation in a boycott to promote Palestinian rights are akin to McCarthy-era loyalty oaths and are a part of a coordinated and well-funded effort⁴ to stifle the Palestinian viewpoint. As found by the District Court, the legislative history of the Certification Requirement shows that “...the goal of the Act is to penalize the efforts of those engaged in political boycotts of Israel and those doing business in Israeli-occupied territories because such boycotts are not aligned with the State’s values.” Jordahl v. Brnovic, 336 F.Supp.3d 1016, 1048 (D. Az. 2018).

The Arizona statute defines boycott as a refusal to deal with persons or entities doing business “in Israel or in territories controlled by Israel”

³ <https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate>

⁴ <https://www.jta.org/2017/12/29/news-opinion/israel-middle-east/israeli-government-oks-72-million-anti-bds-project>

(A.R.S. § 35-393(1) (emphasis supplied). The occupation of the “territories controlled by Israel” including the West Bank, is illegal under international law, and Arizona has effectively expressed its support for that violation of international law by means of this expansive definition. Arizona is thus taking a partisan position on this issue of public importance and is seeking to penalize those who disagree with the position taken by the state. Allowing the state to determine what positions are acceptable in this dispute about an issue of public importance is antithetical to the First Amendment: “This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment.” Koontz v. Watson, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018).

The Focus of Boycotts for Palestinian Rights

The boycott campaigns do not target individuals, companies or institutions based on their national origin or religion. They focus, rather, on companies and institutions that are complicit in Israel’s oppression of Palestinians irrespective of place of incorporation. In recent years, companies boycotted by amici include Hewlett Packard (US), G4S (UK), AirBnb (US), SodaStream (Israel), Caterpillar (US), and Booking.com (US)

Hewlett Packard (HP), whose products figure in this case, is a good example. HP plays a key role in Israel's oppression of Palestinians. It provides technology, equipment and services to the Israeli military, including for the checkpoints and ID card system that underpins Israel's apartheid policies and its movement restrictions for Palestinians.

Amici have also called for the boycott of G4S. G4S is a British security company that helps Israel run prisons where Palestinian political prisoners are held without trial and subjected to torture and ill-treatment. G4S is also involved in providing equipment and services to Israeli military checkpoints, illegal settlements and to military and police buildings. HP and G4S have not been targeted for boycott based on religion or national origin. These companies are targeted for boycott because they provide material support to the systems by which Israel oppresses the Palestinian people.

As a result of a boycott campaign that the amici have participated in, Airbnb has now agreed to stop listing apartments in settlements on the West Bank that are located on stolen Palestinian lands.⁵ It should be noted that the State of Israel, which is the driving force behind statutes like the Arizona

⁵ See *Bed and Breakfast on Stolen Land: Tourist Rental Listings in West Bank Settlements*, Human Rights Watch Report November 20, 2018 https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_0.pdf

Certification Requirement, has announced that it will support efforts to take action against Airbnb over this decision in the U.S..⁶

BDS campaigns have been successful in opening a dialogue about corporate social responsibility and corporate accountability that may not otherwise be available to a majority of Americans. The discourse introduced by BDS campaigns, which makes visible the Palestinian demand for freedom, dignity, respect for human rights and an end to Israeli violations of international law, is different from the predominant discourse, in which the sole focus is Israeli security. A striking feature of BDS campaigns is the support they have garnered from a broad diversity of religious institutions and leaders, students, academics, human rights activists, cultural leaders, and performers.

The boycott movement has employed many of the same tactics (and their internet-era equivalents) that were used in protesting racial discrimination in Claiborne County, Mississippi in the 1960s, as described by the Supreme Court in N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886 (1982): they have marched, they have engaged in peaceful picketing, they have promoted letter-writing campaigns, twitter campaigns and online

⁶ https://foreignpolicy.com/2018/11/27/if-the-u-s-government-wont-act-airbnb-will-west-bank-settlements-rentals-occupation-israel-palestinians-netanyahu/?utm_source=PostUp&utm_medium=email&utm_campaign=7745&utm_term=Morning%20Brief%20OC.

petitions. The fact that these efforts are “...intended to exercise a coercive impact on [the companies] does not remove them from the reach of the First Amendment.” N. A. A. C. P. v. Claiborne Hardware Co., supra, 458 U.S. at 911.

CONCLUSION

Boycott is a peaceful means of resisting oppression. It is expressive conduct protected by the First Amendment. It represents refusal to cooperate with gross injustice, which is the minimum required of a person of conscience. For these reasons and those set forth above, *Amici* pray that the decision of the District Court in favor of Plaintiffs-appellees be affirmed.

Dated: New York, New York
January 22, 2019

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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CERTIFICATE OF SERVICE

I, Jethro M. Eisenstein, hereby certify that I electronically filed the foregoing Brief Of *Amici Curiae*, American Friends Service Committee, Israel Palestine Mission Network Of The Presbyterian Church (USA), A Jewish Voice For Peace, Inc., US Campaign For Palestinian Rights, US Palestinian Community Network, US Campaign For The Academic And Cultural Boycott Of Israel And Friends Of Sabeel North America, In Support of Plaintiffs-Appellants And Affirmance with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 22, 2019, which will send notice of such filing to all registered CM/ECF users.

/s/ Jethro M. Eisenstein

Jethro M. Eisenstein